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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JANE DOES 1-10, et al.,

11 Plaintiffs,

12 v.

13 UNIVERSITY OF WASHINGTON,
14 et al.,

15 Defendants.

CASE NO. C16-1212JLR

ORDER DENYING
DEFENDANT’S MOTION TO
STRIKE UW’S AFFIRMATIVE
DEFENSES

16 **I. INTRODUCTION**

17 Before the court is Defendant David Daleiden’s motion to strike Defendant and
18 Crossclaim Defendant University of Washington’s (“UW”) affirmative defenses to the
19 crossclaim. (Mot. (Dkt. # 171).) The court has reviewed the motion, the submissions

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1 the parties filed in support of and opposition to the motion, the other relevant portions of
2 the record, and the applicable law. Being fully advised,¹ the court DENIES the motion.

3 II. BACKGROUND

4 This case arises out of written requests Mr. Daleiden sent to UW under the
5 Washington Public Records Act (“PRA”), RCW ch. 42.56. (TAC (Dkt. # 77) at 1-2.) On
6 August 3, 2016, Plaintiffs Jane Does 1-10 and John Does 1-10 (collectively, “Doe
7 Plaintiffs”) sued UW and Mr. Daleiden to prevent UW from releasing documents
8 responsive to Mr. Daleiden’s PRA requests without first redacting certain information.²
9 (*See generally* Compl. (Dkt. # 1).)

10 On August 15, 2016, Mr. Daleiden filed a motion to dismiss arguing that UW, as
11 an arm of Washington State, was immune from suit, and that if the court were to dismiss
12 UW, it should dismiss Mr. Daleiden too. (*See* MTD (Dkt. # 49).) In response, UW
13 stated that it consented to jurisdiction for purposes of Doe Plaintiffs’ claims for
14 declaratory and injunctive relief. (UW MTD Resp. (Dkt # 71) at 3.)

15 Based on its response to Mr. Daleiden’s motion, the court found that UW waived
16 its Eleventh Amendment immunity to the equitable claims raised by Doe Plaintiffs, but
17 the court found a lack of subject matter jurisdiction on other grounds. (10/4/16 Order
18 (Dkt. # 76) at 8-14.) The court granted Doe Plaintiffs leave to amend (*id.* at 14-18), and
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20 ¹ No party asked for oral argument, and the court determines that oral argument would
21 not be helpful to its disposition of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(2).

22 ² Doe Plaintiffs also sued Zachary Freeman (*see* Compl. ¶ 12), but the court subsequently
dismissed him (*see* 12/27/16 Order (Dkt. # 105)).

1 they subsequently filed a third amended complaint in which they added Defendant Perry
2 Tapper (*see* TAC ¶ 12). In March 2018, UW, Mr. Tapper, and Mr. Daleiden answered
3 Doe Plaintiffs’ third amended complaint. (*See* UW Ans. (Dkt. # 157); Daleiden Ans.
4 (Dkt. # 158).) In his answer, Mr. Daleiden asserted crossclaims against UW. (Daleiden
5 Ans. at 7-10.) Unlike Doe Plaintiffs’ equitable claims against UW, Mr. Daleiden’s
6 crossclaims seek statutory penalties, attorney’s fees, and costs. (*Id.* at 10.)

7 On March 26, 2018, UW answered Mr. Daleiden’s crossclaims. (UW Ans. to CC
8 (Dkt. # 163).) UW asserted three affirmative defenses: (1) failure to state a claim for
9 which relief can be granted, (2) lack of subject matter jurisdiction, and (3) Eleventh
10 Amendment immunity. (*Id.* at 4.) On April 16, 2018, Mr. Daleiden moved to strike these
11 affirmative defenses based on Federal Rule of Civil Procedure 12(f). (*See* Mot. at 1
12 (citing Fed. R. Civ. P. 12(f)).) The court now considers Mr. Daleiden’s motion.

13 III. ANALYSIS

14 Federal Rule of Civil Procedure 12(f) provides that a court may, on its own or on a
15 motion, “strike from a pleading an insufficient defense or any redundant, immaterial,
16 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The court may only strike
17 material from a pleading if it falls within one of those five categories. *Whittlestone, Inc.*
18 *v. Handi-Craft Co.*, 618 F.3d 970, 973-74 (9th Cir. 2010).

19 Mr. Daleiden argues that the court should strike UW’s affirmative defenses of
20 “failure to state a claim upon which relief can be granted” and “lack of subject matter
21 jurisdiction” because they fail to give him “fair notice” of the “specifics” of these two
22 defenses. (*See* Mot. at 2.) The Ninth Circuit, however, recently held that “the ‘fair

1 notice' required by the pleading standards only requires describing . . . [an affirmative]
2 defense in 'general terms.'" *Kohler v. Flava Enters., Inc.*, 779 F.3d 1016, 1019 (9th Cir.
3 2015) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*
4 § 1274 (3d ed.1998)). In so holding, the Ninth Circuit implicitly declined to apply the
5 *Iqbal/Twombly*³ plausibility standard to the pleading of affirmative defenses. *See Walker*
6 *v. Charter Commc'ns Inc.*, No. 3:15-cv-00556-RCJ-VPC, 2016 WL 3563483, at *3 (D.
7 Nev. 2016) (finding no reason to alter its position that the *Iqbal* standard does not apply
8 to affirmative defenses); *Fed. Trade Comm'n v. Vemma Nutrition Co.*, No. CV-15-
9 01578-PHX-JJT, 2016 WL 3548762, at *1 (D. Ariz. 2016) (concluding that the *Twombly*
10 standard does not apply to affirmative defenses). The court therefore denies Mr.
11 Daleiden's motion to strike because UW sufficiently describes its affirmative defenses in
12 "general terms." *See Kohler*, 779 F.3d at 1019.

13 In addition, UW may raise lack of subject matter jurisdiction at any point during
14 the proceedings. *See Fed. R. Civ. P. 12(h)(3)*. As a practical matter, striking this
15 affirmative defense only to later permit Doe Plaintiffs to raise it wastes judicial resources.
16 Further, Mr. Daleiden has not demonstrated that he will suffer any prejudice. *Hernandez*
17 *v. Balakian*, No. CVF06-1383OWW/DLB, 2007 WL 1649911, at *1 (E.D. Cal. June 1,
18 2007) (quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice &*
19 *Procedure* § 1381 (3d ed. 1998)) ("Rule 12(f) motions often are not granted in the
20 absence of a showing of prejudice to the moving party."). Thus, the court also denies Mr.

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22 ³ *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-83 (2009); *Bell Atl. Corp. v. Twombly*, 550
U.S. 544, 554-63 (2007).

1 Daleiden’s motion to strike Doe Plaintiffs’ “lack of subject matter jurisdiction”
2 affirmative defense on this ground as well.

3 Mr. Daleiden also argues that “‘failure to state a claim upon which relief can be
4 granted’ is not an affirmative defense under [Federal Rule of Civil Procedure] 8(c).”
5 (Mot. at 2 (citing Fed. R. Civ. P. 8(c)).) However, Federal Rule of Civil Procedure
6 12(h)(2)(A) provides that a party may raise “[f]ailure to state a claim upon which relief
7 may be granted . . . in any pleading allowed or ordered under [Federal] Rule [of Civil
8 Procedure] 7(a).” *See* Fed. R. Civ. P. 12(h)(2). One of the pleadings allowed under Rule
9 7(a) is an answer to a crossclaim. *See* Fed. R. Civ. P. 7(a)(4); *see also Valley Cmty. Bank*
10 *v. Progressive Cas. Ins. Co.*, No. 5:11-CV-00574-JF HRL, 2011 WL 1833116, at *3
11 (N.D. Cal. May 13, 2011) (citing *Hernandez*, 2007 WL 1649911, at *2). Thus, UW may
12 raise this defense in its answer to Mr. Daleiden’s crossclaim. Accordingly, the court
13 denies Mr. Daleiden’s motion on this additional ground. (*See* UW Ans. to CC at 4.)

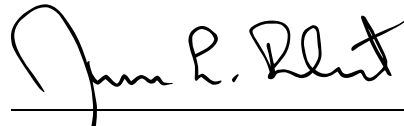
14 Finally, Mr. Daleiden argues that the court should strike UW’s “Eleventh
15 Amendment immunity” affirmative defense because UW has waived its immunity in this
16 case. (Mot. at 2.) However, UW expressly waived its Eleventh Amendment immunity
17 only “for purposes of considering the issues of declaratory judgment and/or injunctive
18 relief as raised by Doe Plaintiffs.” (*See* UW MTD Resp. at 3.) UW did not expressly
19 waive its Eleventh Amendment immunity to Mr. Daleiden’s crossclaims for statutory
20 penalties, fees, and costs. (*See* Resp. (Dkt. # 174) at 9.) Without ruling on the issue, the
21 court notes that there is at least out-of-circuit authority for the position that a party may
22 partially waive its Eleventh Amendment immunity in certain circumstances. *See Hankins*

1 | *v. Finnel*, 964 F.2d 853, 856 (8th Cir. 1992) (providing that an Eleventh Amendment
2 | waiver may be partial or limited) (citing *WJM, Inc. v. Mass. Dep't of Pub. Welfare*, 840
3 | F.2d 996, 1002-03 & n.8 (1st Cir. 1988), *abrogated on other grounds by Reoppel v.*
4 | *Massachusetts*, 936 F.2d 12 (1st Cir. 1991).⁴ In any event, the issue is now moot because
5 | UW “has elected not to pursue this defense.” (Resp. at 9.) Accordingly, the court denies
6 | as moot Mr. Daleiden’s motion to strike UW’s Eleventh Amendment immunity
7 | affirmative defense.

8 | IV. CONCLUSION

9 | Based on the foregoing analysis, the court DENIES Mr. Daleiden’s motion to
10 | strike UW’s affirmative defenses (Dkt. # 171).

11 | Dated this 19th day of July, 2018.

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13 | JAMES L. ROBERT
14 | United States District Judge

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18 | ⁴ Mr. Daleiden relies upon *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), to argue that
19 | UW’s waiver of its Eleventh Amendment immunity regarding Doe Plaintiffs’ equitable claims
20 | extends to the entire case—including his crossclaim (*See* Mot. at 2.) *Embury*, however,
21 | involved claims that were added to the complaint following the state’s removal of the action to
22 | federal court. *Embury*, 361 F.3d at 563. The Ninth Circuit held that by removing the case to
federal court, the state had removed not just the original claims, but the entire case. *Id.* at 565.
Thus, the state had waived its Eleventh Amendment immunity “over claims added in the
amended complaint” as well. *Id.* at 566. The court is skeptical that *Embury* necessarily applies
in the context of a crossclaim brought by another defendant in an action originally filed in federal
court. Nevertheless, the court need not decide the issue because, as noted above, UW has elected
not to pursue its Eleventh Amendment immunity defense. (*See* Resp. at 9.)